Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Counsel, Legal Division
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Date: February 27, 2006

Subject: *In re Pirayou* Opinion Request; O-06-016

I. INTRODUCTION

Former Assemblymember Corbett's last term as a member of the state Assembly ended in November 2004. She is now running for state Senate in 2006 and has an Assembly Committee account containing approximately $80,000 in campaign funds. Because these funds were not transferred to her current Senate Committee account before the end of her last term in the Assembly, they became "surplus campaign funds" pursuant to section 89519 of the Political Reform Act ("Act").[1] The explicit language of section 89519 states that once funds are deemed surplus, they may not be used to support or oppose specific candidates for state elective office in California. (Sections 89519(b)(4) & (b)(5).)

On June 17, 2005, Ms. Corbett, sought written advice from the Commission requesting relief for the consequences of the "gross negligence" of her Committee's treasurer. On July 8, 2005, the Commission issued an advice letter opining that transfer was not permissible under the provisions of the surplus funds statute – section 89519. (See *Pirayou* Advice Letter, No. A-05-125, extensively quoted in the Analysis section below, and attached hereto as **Exhibit A**.)

Six months later, on January 27, 2006, Ms. Corbett and her Committees engaged Ash Pirayou ("Requestor") to submit a request for an opinion, pursuant to regulation 18320, regarding the same essential issues submitted to the Commission in June 2005. The request was submitted on behalf of: Ellen Corbett (a former Assembly member and 2006 candidate for the state Senate), Friends of Ellen Corbett for Assembly – No. 980193

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[1] The Act is found in Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997, of the California Code of Regulations. All further statutory or regulation references are to the Government Code or Title 2 of the California Code of Regulations.

("Assembly Committee"), and Friends of Ellen Corbett – No. 1253363 ("Senate Committee").[2]

II. QUESTION PRESENTED

May Ms. Corbett, with attribution, transfer surplus campaign funds remaining in her Assembly Committee to her Senate Committee?

III. BACKGROUND[3]

Ellen Corbett was first elected as a member of the California State Assembly on November 3, 1998. Former Assemblymember Corbett ("Ms. Corbett") served in the Assembly three consecutive two-year terms until her last term expired on November 30, 2004. The Friends of Ellen Corbett for Assembly ("Assembly Committee") was used as the candidate controlled committee for all three of Ms. Corbett's elections to the California Assembly.[4]

On February 14, 2003, Ms. Corbett established the Friends of Ellen Corbett committee ("Senate Committee") for purposes of depositing money to be used for her election to the California State Senate in 2006.

On June 10, 2003, Ms. Corbett retained Rita Copeland of River City Business Services ("Treasurer") for treasurer and professional accounting services for both the Assembly and Senate Committees. Amended Form 410's were filed for both committees to reflect the change in the treasurer position. The Treasurer obtained complete possession over the funds and records of both committees. As of December 31, 2004, or one month after Ms. Corbett's last term in the Assembly ended, the cash balance for her Assembly Committee was $97,851.43.

Prior to the expiration of her final term in the Assembly on November 30, 2004, Ms. Corbett or members of her campaign staff repeatedly asked her Treasurer to transfer the cash balance in her Assembly Committee to her Senate Committee. Each time the

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[2] On February 3, 2006, the Executive Director of the Commission sent a letter to the Requestor indicating that a hearing on the matter before the Commission would be set for March 14, 2006. (See Regs. 18320 et seq.)

[3] These facts are based upon information provided in Mr. Pirayou's Request For Opinion ("Request"), including declarations submitted by Ms. Corbett and her treasurer, Rita Copeland. Those materials are attached hereto as **Exhibit B**.

[4] We note that at its March 14, 2002, meeting, the Commission no longer permitted redesignation of state candidate committees. (Legal Division memorandum dated February 28, 2002, proposing to amend various regulations, including those interpreting sections 85201 and 85201.) This memorandum does not address whether or not the "no redesignation" rule is applicable to these facts. Also, to the extent relief may be granted with respect to Ms. Corbett's 2002 election, any contributions received by the candidate to her Assembly account on or after January 24, 2004 may be further limited. For example, regulation 18531.61 provides that contributions accepted by state candidates after an election and on or after January 24, 2004, may only be used for payment of debts. (Also see *McPeherson* Advice Letter, No. A-04-2004.) Finally, this memorandum does not address whether the candidate has properly filed for an extension from the committee termination requirements of regulation 18404.1 with respect to the Assembly committee.

Treasurer was contacted, she repeatedly assured Ms. Corbett or her campaign staff that there was ample time to do so. The Treasurer's belief was based upon an erroneous application of regulation 18404.1(b)(1). That regulation indicates that candidate controlled committees with net debts outstanding "must be terminated no later than 9 months after the earliest of the date the candidate is defeated, leaves office or the term of office for which the committee was formed ends . . ."

However, the Assembly Committee funds were not transferred to the Senate Committee before Ms. Corbett's state Assembly term of office expired. Therefore, on November 30, 2004, the Assembly Committee funds became "surplus funds" pursuant to section 89519. In April 2005, Ms. Corbett discovered that the deadline for transfer of the funds had passed. The Treasurer confirmed that she had made an error and that Ms. Corbett was now prohibited from transferring the surplus funds.

The present balance of funds in the Assembly Committee account is $81,617. Ms. Corbett had no other intention or purpose for the substantial balance of funds in the Assembly Committee account other than transfer to and use by the Senate Committee. Ms. Corbett relied on the erroneous advice of her professional Treasurer who believed the funds would become surplus nine months after Ms. Corbett left office instead of at the end of her last term in office. If the transfer of funds is permitted by the Commission, the Senate Committee intends to fully disclose the transfer with attribution using the appropriate accounting method described in section 85306 and regulation 18536.

IV. ANALYSIS

The Requestor asks the Commission: "[M]ay Ms. Corbett transfer the funds remaining in the Assembly Committee to the Senate Committee with attribution . . .?" The argument supporting the Request is laid out in four parts. (See Exh. B, generally.) However, prior to analyzing Requestor's arguments as to whether the Commission should allow Ms. Corbett to transfer funds in the manner requested, the applicable law is described.

A. Application of Section 89519 – "Use of Surplus Campaign Funds"

Effective January 1, 1990, the Act was amended by Senate Bill 1431 (Ch. 1452, Stats. 1989) to include provisions in the Act to regulate the appropriate use of campaign funds.[5] Currently, the permissible uses of campaign funds are governed by sections 89510 through 89522. Generally, campaign funds must bear at least a reasonable relationship to a political, governmental, or legislative purpose. Specified expenditures, such as those that confer a substantial personal benefit on a candidate or committee, must bear a direct relationship to these purposes. Section 89519 specifies when campaign funds controlled by a candidate or elected officer become surplus, thereby limiting the use of the funds to only specified purposes.

[5] The use of campaign funds was formerly governed by provisions of the Elections Code as interpreted by the Attorney General's office. On January 1, 1990, these provisions were initially contained in section 85807. They were later (and are presently) contained in section 89519.

Section 89519 states in pertinent part:

> "(a) Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100).
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> "(b) Surplus campaign funds shall be used only for the following purposes:
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> (1) The payment of outstanding campaign debts or elected officer's expenses.
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> (2) The repayment of contributions.
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> (3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.
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> (4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.
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> (5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.
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> (6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount."

Subdivision (a) describes when campaign funds are deemed surplus, as noted above. The explicit language of subdivision (b) of section 89519 states: "Surplus campaign funds *shall be used only for the following purposes . . .*" after which there are six numbered paragraphs listing the ways in which such funds may be spent. (Emphasis

added.) Thereafter, the statute presents an exclusive laundry list of six items for which surplus funds may be spent. (See section 89519, subdivisions (b)(1) through (b)(6).)[6]

The subdivision most pertinent to the Request, subdivision (b)(5), contains language prohibiting the use of surplus funds to support or oppose specific candidates for state elective office in California. That subdivision says: "(b) Surplus campaign funds shall be used only for the following purposes: [¶ . . . ¶] (5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure." The language of subdivision (b)(5) was taken verbatim from a predecessor statute and has therefore been in effect for over 15 years. (See subdivision (e) of former Section 85807 [Senate Bill 1431 (Ch. 1452, Stats. 1989) effective January 1, 1990].)

Therefore, since January 1990, the Commission has consistently advised that the language (now) contained in section 89519(b)(5) has prohibited a candidate from using "surplus campaign funds" left over from one state or local campaign to fund that same candidate's later campaign for another state or local office in California. (See *Leese* Advice Letter, No. A-90-061; *Shade* Advice Letter, No. A-90-449; *Hefter* Advice Letter, No. T-90-582; *D'Elia* Advice Letter, No. I-90-773; *Biggs*, Advice Letter No. I-92-445; *Edgerton* Advice Letter, No. A-92-572; *Spillane* Advice Letter, No. A-95-071.)

The Request explicitly concedes that the approximately $80,000 at issue are "surplus campaign funds" under section 89519. (See Exh. B, p.3, Fact # 20.) The Request also implicitly concedes that none of the enumerated purposes for which a candidate may use surplus campaign funds under section 89519 includes supporting or opposing specific candidates for state elective office in California. In addition, the Request does not challenge the language of regulation 18951, the only regulation in the Act which directly derives from section 89519.

Regulation 18951 states in pertinent part:

> (a) Campaign funds raised after January 1, 1989, under the control of a candidate or elected officer shall be considered surplus campaign funds on the following dates:
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> (1) Incumbent Candidates: The date on which an incumbent candidate leaves any elective office for which the campaign funds were raised, or, if the candidate is defeated for reelection, the end of the postelection reporting period following his or her defeat, whichever is later. An incumbent candidate who wishes to use funds for a future

[6] Subdivision (c), not shown above, describes how costs associated with an electronic security system, for candidates or elected officers threatened with harm, may be paid for with surplus funds pursuant to the definition of "outstanding campaign debts or elected officer's expenses" contained in subdivision (b)(1).

> election must transfer those funds to a new committee for a future election no later than this date.

Therefore, the statute (at subdivision (b)(5)) and regulation 18951 clearly cover the conduct which is the subject of the Request – a transfer from a California officeholder's Assembly committee to his or her Senate committee.

B. Laws Regarding Construction of Section 89519

Having concluded that the funds are "surplus" under the statutory definition, and that the desired use is not permitted by the statute, we now address whether the statute should or can be construed to allow such a use. The California Supreme Court has stated:

> "We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning."' (*Kimmel, supra*, 51 Cal.3d at pp. 208-209, citing *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218-219; *California Teachers Assn., supra*, 28 Cal.3d at p. 698.) Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. (*California Teachers Assn., supra*, 28 Cal.3d at p. 698.) Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

Therefore, should the Commission find the words of section 89519 to be clear, the Commission could decide at this point that it cannot interpret the words of the section in a way that would add to or alter them to provide the relief requested. (See *Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1042 ["If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature," citing *Lungren* v. *Deukmejian* (1988) 45 Cal.3d 727, 735]; *Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, 484 [holding that because of its expertise, an agency's interpretation of a statute or regulation it enforces is given great weight unless clearly erroneous or unauthorized].)

If the Commission finds that the plain meaning of the language in section 89519 is clear, it could decide at this point in the analysis that it cannot grant the relief requested without adding or altering the law's language, and deny the request. If the Commission finds that the language of the statute is not clear or is ambiguous, the next step would be to determine whether the general provisions of the Act relating to the purposes of the Political Reform Act affect its application, as discussed below.

C. Consideration Of The Requestor's Arguments Based Upon The Necessary Assumption That The Language Of Section 89519 Is Unclear Or Ambiguous

The staff analysis is contained in the staff's advice letter dated July 8, 2005 and attached as Exhibit A. The analysis will not be repeated in this memorandum except as necessary to address the specific points proffered by the Requestor.

1. Requestor's Arguments One & Four: Under The Act's General Purposes The Commission Is Empowered and Should Grant The Requested Relief Because It Furthers The Act's Purposes.

The Request presents four main arguments. We have combined our comments regarding the Requestor's first and fourth arguments into one section relating to an analysis of the general purposes of the Act. The Requestor's arguments state: First, "If the Commission were to grant Ms. Corbett's request to transfer the funds from the Assembly Committee to the Senate Committee, the Commission's Decision would be in furtherance of the Act's purpose"; and fourth, "Based Upon The Commission's Previous Advice Letters, Ms. Corbett Should Be Provided Relief From A Strict Application Of The Law In Her Extraordinary Circumstances In Order To Produce A Result That Furthers The Act's Purpose And Principles Of Fairness." (Exh. B, pp. 4 & 8.)

To support these arguments, the Requestor cites to section 81002(a) and past advice letters. Section 81002, entitled "Purposes of Title," states in pertinent part: "The people enact this title to accomplish the following purposes: [¶] (a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (Section 81002(a).)

The Requestor's argument is that pursuant to its authority under section 81002(a), the Commission can and should ignore the language of section 89519.[7] In other words, Ms. Corbett should be allowed to use surplus funds in a way that contravenes the explicit language of section 89519 so long as, pursuant to section 81002(a), the voters are fully informed.

The Requestor's argument is also based upon instances contained in five advice letters: *Miller* Advice Letter No. A-03-017; *Tomberlin* Advice Letter No. A-97-505; *Johannessen* Advice Letter No. A-96-281; *Roney* Advice Letter No. A-92-420; and

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[7] In *Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1387, the California Supreme Court stated: "[S]tatutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." The California Supreme Court has also stated that, "[a] statute should be interpreted so as to effectuate its apparent purpose." (*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1042, citing *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 798; *Moyer* v. *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 252.)

Campbell Advice Letter No. A-04-153. Four of these five letters[8] were cited as the basis for the request for advice Ms. Corbett initiated in June 2005 (and mentioned above). In response, the Commission's Legal Division issued an advice letter dated July 8, 2005, which stated in pertinent part:

> "Section 89519 states that an officeholder's campaign funds become surplus when, inter alia, the officeholder leaves office. (Section 89519, subd. (a); Reg. 18951, subd. (a)(1).) Therefore, the funds maintained in Friends of Ellen Corbett for Assembly became surplus funds under the Act when the Assembly member left office on November 30, 2004. Section 89519 of the Act governs surplus funds, which states that they may only be used for the specifically delineated purposes set forth in the statute. (Section 89519, subd. (b)(1)-(6).)
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> "Despite the circumstances of your case, the statute does not allow surplus funds to be used for a candidate's future election. In a few extraordinary circumstances where hardship would otherwise result and the purposes of the Act would not be furthered by a strict application of the law the Commission has allowed committees to remedy an error made due to a misreading of the law. We do not find those circumstances to be present in the matter at issue here. The letters you have cited, *Campbell*, No. A-04-153, *Miller*, No. A-03-017, *Tomberlin*, No. A-97-505 and *Johannessen*, No. A-96-281, are distinguishable in three important ways. First, each of the letters cited involved a mistake leading to a personal hardship on the particular candidate. **[Footnote 2**: For instance, in the *Miller* letter the candidate was liable to lose her personal funds used to pay a filing fee; in *Johannessen* at stake was the candidate's ability to recover personal funds from the campaign after an inadvertent reimbursement; in *Tomberlin* and *Campbell* the inadvertent characterization of personal loans as 'forgiven' instead of 'outstanding' prevented repayment of personal funds and personal tax consequences, respectively.**]** In contrast, the hardship at issue here falls on a committee's ability to receive an injection of money for a future election instead of having to raise it via traditional methods. Second, the mistakes at issue in the letters flowed from a mistaken characterization of a given historical transaction or event, which had a personal consequence after an election. **[Footnote 3**: In each scenario of these letters at issue was how to record a prior event or transaction – in *Miller* it was how to characterize the payment of a filing fee; in *Johannessen* it was how to characterize a payment to the campaign by the official; in *Tomerblin* and *Campbell* at issue was the characterization of the status of a loan after the campaign concluded.**]** There, correction of the

[8] The *Roney* Advice Letter, No. A-92-420, is the only letter now cited in support of this argument that was not cited in the original June 2005 request for advice. *Roney* involves a request wherein a candidate was allowed to amend campaign disclosure reports to properly disclose his payment of personal funds, to support his failed candidacy, as loans rather than contributions.

> mistake served the purposes of the Act to accurately follow the reporting laws. In contrast, Ms. Corbett's treasurer missed a deadline to do a certain act which has consequences for a future election.
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> "Finally, section 89519 and regulation 18951, subdivision (a)(1), make abundantly clear the deadline when campaign funds become surplus and the consequences of allowing that deadline to lapse. Therefore, the action you request is expressly prohibited by the statute. The funds have already become surplus by operation of law and there is no Commission discretion to change that result. Indeed, the regulation states the rule in the first sentence of subdivision (a)(1) and reiterates in the second sentence that a candidate 'who wishes to use funds for a future election must transfer those funds to a new committee for a future election no later than this date.' Thus, the statute and the Commission have considered the issue of missing the deadline and emphasized the consequences for doing so. As such, it could not be said that application of the law would not further the purposes of the Act. In light of these differences, we do not find authority for allowing Ms. Corbett to transfer her surplus funds to her future Senate account nor would it further the general purposes of the Act. **[Footnote 4**: We note that section 85319 now allows a candidate to return all or part of any contribution to the donor who made the contribution at any time, regardless of whether other contributions are returned. Thus, nothing prohibits Ms. Corbett from returning her contributions (pursuant to sections 89519, subdivision (b)(2), and section 85319) to contributors who might be identified as willing in turn to make a contribution to her future Senate committee.**]** As a result, Ms. Corbett may not transfer the surplus funds to her Senate account." (*Pirayou* Advice Letter No. A-05-125, footnote designations bolded for ease of reading.)

The Request puts forth the argument that the Legal Division attempted to distinguish the four previously-cited advice letters on two main grounds: (1) that they each involved mistakes leading to "a personal hardship" on the particular candidate, and (2) that the mistakes at issue in the letters flowed from a "mistaken characterization" of a transaction or event, which had a personal consequence after an election and thus allowance for, the correction of the mistake served to further the purposes of the Act to "accurately follow the reporting laws." (Exh. B, p.9.) In response, the Request states:

> "Respectfully, these distinctions are without a substantive difference. In other words, regardless of whether the impact to a candidate is financial or otherwise and regardless of whether the error was a 'reporting' error or otherwise, the Commission, in furtherance of the Act and based upon equitable considerations, permitted committees to remedy errors 'made due to a good faith misreading of the law' so long as the following two factors were present: (1) a severe hardship

would otherwise result by the strict application of the law and (2) the Act's purpose was furthered." (Exh. B, p.9.)

The Requestor also argues that whether the hardship occurs before or after an election is immaterial.

Additionally, the Requestor takes issue with Footnote 4 of the Commission's advice letter, in which the Legal Division pointed out that, as a mitigating factor, Ms. Corbett could "return all or part of any contribution to the donor who made the contribution at any time, regardless of whether other contributions are returned. Thus, nothing prohibits Ms. Corbett from returning her contributions . . . to contributors who might be identified as willing in turn to make a contribution to her future Senate committee." (Exh. B, p.10.)

In response, the Requestor points out, first, that "it is very likely that previous donors to her Assembly committee could just as easily decide to **not** make a donation to her Senate Committee and Ms. Corbett could not command any action otherwise." (Exh.B, s*upra*, emphasis in original.) Second, it states that Ms. Corbett would also incur substantial transactional costs associated with returning such funds. Third, the Request argues that Ms. Corbett would have to expend a substantial amount of her personal time and effort – "at the expense of her ability to conduct other important campaign activities (e.g., voter education efforts)" – without any guarantee that the donors would agree to re-contribute. (*Ibid*) Fourth, the Request points out the $19,000 of the funds at issue were collected before the enactment of Proposition 34 and could have been transferred without attribution to her Senate Committee. Fifth, not providing the relief requested has the opposite effect from serving the Act's purpose of having a more informed electorate.

The Request also cites two additional sources to support its argument: section 81003(e), regarding fairness in the conduct of elections, and regulation 18361.4(d), regarding the fairness of allowing a witness to testify at a probable cause conference in the enforcement context. Section 81003(e) states, "Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly."

Staff believes that granting the request would not further the purposes of the Act as proffered by the Requestor. With respect to section 81002(a), the surplus funds statute inhibits what have been considered improper practices for many years. If the Commission were to construe the principles of detrimental reliance and fundamental fairness in such a way that it felt it should grant the requested relief, a "parade of horribles" might ensue. It is not unlikely that the Commission would soon be inundated by requests from elected officials to be excused from complying with a variety of mandates set out in the language of the Act, based upon the negligence of treasurers willing to fall on their swords. With respect to section 81003(a), while Ms. Corbett is not currently an incumbent, she was a Member of the Assembly from 1998 through 2004. To further the purpose of this subdivision, the Commission could consider her the incumbent, and thus, the equities are not in her favor.

2. Requestor's Argument Two: Whether Rejecting Ms. Corbett's Request To Transfer Funds Would Impose A Duty On Ms. Corbett Not Required By The Strict Language Of The Act.

The second major argument in the Request states that:

> "[T]he only duties imposed on Ms. Corbett by the Act were the following:
> 1. To verify her campaign reports stating that her Treasurer fulfilled the Treasurer's duties using 'reasonable diligence' versus a more exacting standard – extraordinary diligence or perfection. § 84213.
> 2. To use 'all reasonable diligence' in helping the Treasurer prepare the campaign statements versus a more exacting standard – extraordinary diligence or perfection. Reg. 18427(b).
> 3. In the event Ms. Corbett had actual knowledge or 'reason to know' that the Treasure [sic] was not exercising reasonable diligence, Ms. Corbett had to take actions to raise the Treasurer's performance, including taking prudent actions, such as, making specific inquiries of the Treasurer relating to the Treasurer's duties. Reg. 18427(c)." (Exhibit A, p.6.)

This second group of contentions argues that by rejecting Ms. Corbett's request to transfer the surplus funds in violation of the explicit language of section 89519, the Commission would be imposing a duty on her not required by the Act.

This argument points out that, under section 84213, a candidate simply needs to verify her campaign statements "to the best of his or her knowledge [that] the treasurer of each controlled committee used all reasonable diligence in the preparation of the committee's statement."[9] Regulation 18427 further states that a candidate is only required to verify the accuracy of her campaign statements "to the best of his or her knowledge [that his or her statements] are true and complete," and that the candidate or his or her treasurer "must use all reasonable diligence in preparation of such statements." Based upon the Requestor's conclusion that Ms. Corbett met or exceeded the standard of care set out in this regulation, the Requestor argues that Ms. Corbett should be relieved from the consequences of her Treasurer's negligence and in contravention of the explicit language of section 89519.

However, this argument ignores all the other duties and prohibitions imposed on candidates by the Act. For example, Article 4 prescribes the rules applicable to the

[9] Section 84213 states: "A candidate and state measure proponent shall verify his or her campaign statement and the campaign statement of each committee subject to his or her control. The verification shall be in accordance with the provisions of Section 81004 except that it shall state that to the best of his or her knowledge the treasurer of each controlled committee used all reasonable diligence in the preparation of the committee's statement. This section does not relieve the treasurer of any committee from the obligation to verify each campaign statement filed by the committee pursuant to Section 81004."

permissible use of campaign funds. Specifically, sections 89510 – 89518 (commonly known as "personal use law") generally seek to eliminate the personal benefit a candidate can derive from expending her campaign contributions.

Another example involves statutes in the Act that emphasize a candidate's duty to track contributions with respect to the specific "elections" and "offices" for which they were raised. For instance, section 85200 (in Chapter 5 of the Act) states that "[p]rior to the solicitation or receipt of any contribution or loan, an individual who intends to be a candidate for an elective state office . . . *shall* file with the Secretary of State an original statement, signed under penalty of perjury, of intention to be a candidate for a *specific office*." (Emphasis added.)

Similarly, section 89519 establishes a deadline as to when campaign contributions made to support a specific campaign will be deemed "surplus," i.e., off limits as the means to support a candidate for a different election or office. Such a provision thus, imposes a duty on the candidate.

Moreover, it should be pointed out that candidates cannot simply rely on their treasurers to perform all the candidate's duties and handle all the required filings in a proper manner. Under regulation 18427, "the candidate shall be subject to the same duties imposed upon treasurers" with regard to candidate campaign statements. (Reg. 18427(b), last sentence.) Such duties include taking "steps to ensure that all requirements of the Act concerning the receipt and expenditure of funds and the reporting of such funds are complied with." (Reg. 18427(a)(3).) The Commission's past advice letters implicitly reflect the notion that both treasurers *and candidates* have filing and reporting duties. (See, e.g., *Benedetti* Advice Letter, A-01-222; *Davidson* Advice Letter, I-90-096.) Such provisions appear to indicate that a candidate cannot, in all instances, avoid application of certain consequences of the Act simply because they reasonably relied upon their treasurer to verify the correctness of filings.

Finally, even if one assumes for purposes of argument that the standards of care focused upon in the Request are the only relevant ones to assess, one might view the "best of my knowledge" and "reasonable diligence" standards as misplaced in this context since the situation at issue does not involve a dispute regarding inaccurate filings. Here, Ms. Corbett and her committees are simply seeking relief from the automatic consequences of their Treasurer's inaction. The applicable remedy here may be for the Commission as a quasi-legislative body to re-examine the statute and its regulations, and to alter the regulations, if feasible and appropriate, but not to provide specific relief from the consequences of a candidate's inaction, a relief that may be more appropriate for the courts or for the Commission in a quasi-judicial role. (See**,** e.g., Code of Civil Procedure section 473(b) in the civil court context [permitting California courts to grant parties relief, upon "terms as may be just," from the consequences of their "mistake, inadvertence, surprise, or excusable neglect."]; also see Reg. 18361.5(d) [authorizing the Commission to consider aggravating and mitigating factors, but only for purposes of fashioning an appropriate penalty in the enforcement context – i.e., after a violation of the Act has occurred].)

3. Requestor's Argument Three: Whether The Commission Can Use The Principles Of Detrimental Reliance And Fundamental Fairness, Relied On In The Past By The Commission, To Provide Ms. Corbett The Relief Requested, And Thereby Allow The Transfer Of Funds To Her Senate Committee.

The third argument in the Request is that "the Act clearly includes the concepts of fairness and detrimental reliance in its provisions. . . ." (Exh. B, p.8, ¶5.) To support this argument, the Request cites to several disparate sources in, or associated with interpretations of, the Act that use the word "fair" or a variation thereof.

First, the Request cites to the *Bagatelos* Advice Letter (No. A-93-309a). In that letter, the Commission allowed the public official (Alioto) to avoid reimbursing a foreign government for the portion of a gift she accepted in excess of the gift limit. The general counsel of the Commission at the time wrote: "We understand that the ethics statutes are relatively new and that our interpretation of the applicable statute may have been one of first impression. We also understand that Supervisor Alioto may have reasonably relied upon what she believed was our advice in accepting the gift of travel expenses from the Chengdu Government for her entourage in connection with her recent trip to China."

However, the concept of detrimental reliance discussed in the *Bagatelos* letter appears to have dealt with that public official's reliance upon potentially ambiguous information received from Commission staff, not her own treasurer.

In addition, unlike the situation in *Bagatelos*, the events which transform campaign funds into surplus funds (e.g., leaving elected office) and the type of limitations placed upon the use of surplus funds dictated by section 89519 are *not* "relatively new." As previously indicated, a comparison of current section 89519 and its predecessor statute (section 85807, effective January 1, 1990) shows that, for purposes of these issues, they are materially indistinguishable. (See discussion, *supra*, regarding Senate Bill 1431 (Ch. 1452, Stats. 1989).) For over 15 years the rule has been that: (1) campaign funds are deemed surplus funds upon an official's "leaving any elected office," and (2) the permissible uses for surplus funds have not included supporting or opposing specific candidates for state or local elective office in California. Therefore, though the concept of fairness and reliance does present itself in the Act, the situations to which the Request cites can be distinguished.

The Request also cites to other sources where variations on the words "fair" and "reliance" are used. Citing to *In re Pelham* Opinion (2001) 15 FPPC Ops. 1, the Request indicates that the Commission decided that disgorgement of funds received under section 85701 "comports with general notions of fairness and justice." (*Id*. at p.11; See Exh. A, p.8, first paragraph.) More specifically, the Commission there decided that funds, accepted by a candidate or committee in violation of section 85701 *and* a similar local ethics law, should only be disgorged once – to either the city treasurer or the state's General Fund, but not to both. The Commission in the *Pelham* Opinion held that to insist on double disgorgement would not comport with "general notions of fairness and

justice." The *Pelham* Opinion is distinguishable in that to hold otherwise would have resulted in a punitive double payment of money, something not at issue in the factual context of the Request.

The Request also cites to the *Whitnell* Advice Letter (No. A-01-017) wherein Commission staff advised that "[r]eliance on an appraisal immunizes the official only to the extent that such reliance is reasonable at the time of the decision." (*Id.* at p.6; See Exh. B, p.8, No. 3.) This citation can be distinguished in that it describes a conflict-of-interest situation in which the public official is advised as to what extent he may rely upon an appraiser on a factual determination – the value of property – not whether a candidate can delegate his or her duties to his or her treasurer.

4. Other Issues: Attribution And Debt.

The following comment is made with specific regard to the portion of the Request stating, "It is also important to note that nearly $19,000 of the funds in the Assembly Committee are funds collected before the enactment of Proposition 34 and could have been transferred [sic] without attribution to her Senate Committee."

This statement suggests that the Requestor views $19,000 to not be subject to the surplus funds statutes. This suggestion is erroneous. Section 85306(b) permits the transfer of campaign funds possessed on January 1, 2001, to be transferred *without attribution*, as otherwise required by section 85306(a). (See reg. 18530.2.) However, the surplus funds provisions of section 89519 apply to *any campaign funds raised after January 1, 1989*. In this instance, section 85306 does not apply because all of the funds[10] contemplated to be transferred are surplus funds.

D. Recommendations

Legal Division staff believes that if the requested relief were granted, the Commission might invite a long line of elected officials seeking similar relief, from all types of mandates in the Act, based upon the purported negligence of their treasurers. The staff recommends that the Commission not issue an opinion, or in the alternative, issue an opinion that substantially restates the analysis of the July 2005 advice letter.

[10] It is assumed that none of the funds were raised before or on January 1, 1989. However, Commission staff has consistently advised that if funds are commingled, the provisions of the surplus funds statute apply. (*Edgerton* Advice Letter, *supra*.) Therefore, this is not an issue that needs to be addressed further.